Case and Comment.

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS.

INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED.

LEGAL NEWS NOTES AND FACETIÆ.

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CASE AND COMMENT.

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Neither Here Nor There.

A novel situation appears in a North Carolina case, respecting the jurisdiction of the crime of murder committed by shooting from that state into Tennessee, where the person killed was standing when struck. After the Supreme Court of North Carolina decided that there was no jurisdiction in that state over the crime because the stroke was, in legal contemplation, given in Tennessee, the prisoner was arrested in North Carolina as a fugitive from justice, as we learn from counsel in the case, on the basis of an indictment for the murder found in Tennessee, whereupon his counsel sued out a writ of habeas corpus, claiming that he was not liable to extradition because he had never fled from the demanding state and therefore was not a fugitive. From a decision against the prisoner, an appeal has been taken and is now pending in the Supreme Court of North Carolina. The North Carolina Court having decided against its own jurisdiction of the murder, on the ground of the prisoner's constructive presence in Tennessee where the ball struck the victim, has now a pretty severe test of the theory of constructive presence. It may be consistent to say that if he was constructively present for the purpose of dealing the blow, he was so much constructively present that his actual presence in another state constitutes an escape from Tennessee as a fugitive from its justice. If the court decides that he is not a fugitive from Tennessee and cannot be surrendered, the only apparent way to secure a conviction would be to abduct the murderer and carry him into the jurisdiction of the courts of Tennessee. Otherwise "border ruffians" will fill a larger place than ever in criminal annals. [A newspaper item informs us since the above was written that the prisoner has won his case and been discharged.]

The Common Enemy.

The most unsatisfactory decisions are those in which the court considers itself bound by authority which in fact does not exist. A recent illustration is the South Carolina case of Edwards *v.* Charlotte, C. & A. R. Co., 22 L. R. A. 246, in which the court holds that the common-law rule which regards surface water as a common enemy which each one can fight as he chooses regardless of the injury to his neighbor, is in force in that state by reason of the statute adopting the common law. The difficulty with that decision is that there is no such common-law rule, as the Georgia court decides in a subsequent case after a careful investigation of the subject. Mayor of Albany *v.* Sikes, Apr. 23, 1894. The rule which regards surface water as a common enemy appears to have originated in Massachusetts, in Gannon *v.* Hargadon, 10 Allen, 109. But the rule is not called the common-law rule in that case which simply follows the reasoning of prior Massachusetts cases. Text-writers seem to have given it that name to distinguish it from the rule of the civil law. This distinction was natural and readily adopted by judges without the consideration which the

subject demanded. Many of them have cited in support of the rule *Lord* Tenterden's expression in regard to the sea, that it was "the common enemy" which every one may fight as best he may. Rex *v.* Pagham, 8 Barn. & C. 355. The usually accurate *Chief Justice* Beasley of New Jersey made this mistake in Union *v.* Durkes, 38 N. J. L. 21. But that such expression was not intended to apply to surface water appears from the fact that *Lord* Tenterden himself expressly refused to apply it to the flood water of a river, in Rex *v.* Trafford, 1 Barn. & Ad. 874, where he states that it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. That the "common-law" rule as generally understood is not the rule in England is shown by the note to Gray *v.* McWilliams, 21 L. R. A. 593, where the cases upon the subject, English and American, are collected.

Compulsory Education.

New York has not passed a more important statute in many years than its new law for compulsory education. Although the millennium is not to be expected just yet even in New York, a fair enforcement of this Act will have great and far-reaching results. It will make the ugly brood of social and civic problems produced by the rapid growth of cities and monopolies look much less formidable. Not only will the individual children who may be gathered into schools from factories and sweating establishments, and even out of actual bondage to professional mendicants or criminals, be given a chance to rise into an intelligent, self-reliant, and comfortable existence, but an honest, thorough attempt to enforce the law will force some other problems to the front for solution. "How the Other Half Lives" will come more vividly to the knowledge of that portion of the people who live in homes of decency and comfort. Their ignorance of the facts has been partly responsible for the disgrace of permitting a continual increase of suffering, squalor, and degradation among multitudes of human beings in a land of plenty. There should be no stopping short of the point where every *child* at least shall have necessary food, clothing, and shelter as well as education for decent living. Once compel the tax-payers to foot the bills for these things and there will be much less indifference to the causes of suffering, degradation, and crime. We shall then find that American thought, knowledge, and conscience are not inadequate to the development of a real civilization. Privation, degradation, and starvation are queer constituents of a civilization, and the abandonment of children by thousands and tens of thousands to education in vice and crime is a somewhat strange exercise of the function of the state as *parens patriæ*. When American thought once gets fairly turned in this direction, we shall learn the unspeakably bad economy of paying millions of dollars for crimes which we could have prevented by spending thousands instead, and with awakened intelligence and conscience we shall not longer permit hunger and cold to be the necessary lot of any, or the plague spots in our cities to remain. Civilization in reality—when all who honestly try shall be able to get, at the least, decent food, shelter, and clothing from the magnificent American abundance—is in the possibilities of our future, and the New York Education Law is a good stride toward it. Much depends upon its fair enforcement.

Newspaper Law.

Of a great English scholar it was said that science was his forte and omniscience his foible. This foible is by no means exclusively British and is nowhere better illustrated than in newspaper discussion of law questions. Some very able editors are peculiarly fond of expressing opinions on judicial decisions. Their most common mistake is to confuse purely legal questions with the question as to what the law ought to be. But frequently they proceed to revise the judges on purely legal grounds, with a result which they did not intend and of which they are often unconscious. For various reasons lawyers do not often take the trouble to call the editor's attention to his mistakes of this kind. One of the latest illustrations of this sort was an editorial comment, in one of the very best newspapers of the country, on a Connecticut decision granting the state a new trial in a criminal action. The editor suggests that the case be taken to a federal court which would make very short work of it under the United States constitutional prohibition against putting a prisoner twice in jeopardy. Since the constitutional provision referred to by the editor was long ago decided to have no relevancy to trials in state courts, this is about an average sample of newspaper law.

Index to Notes
IN
LAWYERS' REPORTS, ANNOTATED.

Book 25, Parts 4, 5.

Mentioning only complete notes therein contained without including mere reference notes to earlier annotations.

The part containing any note indexed will be sent with CASE AND COMMENT for one year for 75 cents.

Among the New Decisions.

Constitutional Law.

The law as to constitutional amendments is illustrated in State, *ex rel.* Woods, *v.* Tooker, 25 L. R. A. 560, holding that the provision of the Montana constitution for three months' notice before election as to a proposed amendment is mandatory, and that publication for two weeks only is a fatal defect.

The constitutional rights in property are held to be infringed by a city ordinance prohibiting the owner of land to build on his property within the city limits without permit from the city building inspector, from whose decision no appeal is allowed. Sioux Falls *v.* Kirby (S. Dak.) 25 L. R. A. 621.

The unusual question as to the effect of the illness of a governor as constituting a vacancy in his office, is decided in the New Hampshire case of Barnard *v.* Taggart, 25 L. R. A. 613, holding that illness which disables him from performing the duties of the office creates a vacancy.

The constitutional class of voters is held in the New Jersey case of State, *ex rel.* Allison, *v.* Blake, 25 L. R. A. 480, to be beyond the power of legislation to diminish or enlarge, and that a statute could not confine the right to vote for a road commissioner to freeholders, nor extend it to females or nonresidents of the district even if they were freeholders.

The Kansas constitution denying the right to vote to persons who have ever voluntarily borne arms against the government unless their disability has been removed, is held in Boyd *v.* Mills, 25 L. R. A. 486, to be free from conflict with the Federal Constitution prohibiting, among other things, any bill of attainder.

A succession duty or tax on the transmission of decedents' estates is held constitutional in Maine by the decision in State *v.* Hamlin, 25 L. R. A. 632, on the ground that it is an excise duty and n t a tax on property, while the court expressly declares that there is no constitutional right to transmit property at death, or to take by inheritance.

A statute limiting the amount of toll which may be taken by a water mill which does grinding for the public is held, in the Maine case of State *v.* Edwards, 25 L. R. A. 504, to be constitutional and to prevail against a contract for higher tolls.

Extradition.

The discharge of a person surrendered by a foreign nation in extradition proceedings when the indictment is set aside is held in *Re* Foss (Cal.) 25 L. R. A. 593, to give him no exemption from arrest on a subsequent complaint for the same offense.

Corporations.

A foreign corporation is held in Sullivans *v.* Sullivan Timber Co. (Ala.) 25 L. R. A. 543, not to be doing business in a county so as to subject it to suit there by the mere fact that it has an agent there who pays taxes on and has possession of an unemployed railroad and machinery which had previously been used in operating a mill which had now suspended operation.

Insurance.

A life insurance policy payable to the son of the insured is held in Heinlein *v.* Imperial Life Insurance Co. (Mich.) 25 L. R. A. 627, not to constitute a wager policy where the insured paid the first premium, and the son, who has general charge of the business of the insured, forwarded the others in her behalf.

A mere transfer, called a bill of sale, without consideration and without delivery of possession of the property, is held in Forward *v.* Continental Ins. Co., 142 N. Y. 382, 25 L. R. A. 637, not to constitute such a change of title or incumbrance as will defeat the insurance policy, even if it was intended to defraud creditors.

The neglect of a trust company holding an insurance policy on mortgaged property to give notice of sale of the property is held in Phœnix Ins. Co. *v.* Omaha L. & T. Co. (Neb.) 25 L. R. A. 679, not to defeat the policy of insurance thereon so far as the interest of the trust company was concerned, where the policy provides that the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner of the property.

The same provision was construed in the New York case of Eddy *v.* London Assurance Co., 143 N. Y. 311, 25 L. R. A. 686, holding it to mean that the mortgagee's interest shall not be injuriously "impaired or affected" by the mortgagor's act, and therefore that a mortgagee's right of recovery cannot be reduced on account of other insurance taken by the mortgagor. It also decided that the destruction of the property pending the foreclosure did not require the mortgagee to suspend those proceedings although the insurer had the right of subrogation.

Electric Wires.

Negligence in respect to electric light wires is the question involved in Illingsworth *v.* Boston Electric Light Co., 161 Mass. 583, 25 L. R. A. 552, which holds that an employé of one of two joint users of a frame for such wires does not take the risk of the bad condition of the wires of the other unless he has actual knowledge of it and voluntarily exposes himself to it.

The court in Hector *v.* Boston Electric Light Co., 25 L. R. A. 554, decided that an electric light company by allowing another company to use its standard for wires on the roof of a building does not assume any risk to employés of the latter for the safe insulation of its wires

over the roof of an adjoining building on which they had no right to go by reason of such permission to use the standard.

Hospitals.

Injury to an inmate of a hospital for the insane, which is a purely eleemosynary institution, caused by torts or negligence of managers and employés, is held in Downs *v.* Harper Hospital (Mich.) 25 L. R. A. 602, to create no liability on the part of the institution.

Master and Servant.

The question of vice-principal or fellow servants is involved in the Federal case of Canadian Pac. R. Co. *v.* Johnston, 25 L. R. A. 470, holding that a conductor of a freight train having exclusive control occupies the position of vice-principal towards a brakeman.

The Maryland case of Norfolk & W. R. Co. *v.* Hoover, 25 L. R. A. 710 (somewhat in conflict with the Arkansas and New York decisions, 25 L. R. A. 386, and 396), holds that a train dispatcher with power to employ and discharge flagmen and brakemen, is, in sending out incompetent or unfit brakemen, by whose negligence an engineman was injured, the fellow servant of the latter.

The question, who are fellow servants within the rule as to injuries by servants to volunteers assisting them, is in the Maine case of O'Donnell *v.* Maine Central R. Co., 25 L. R. A. 658, considered with reference to employés of a contractor, who, to facilitate their work, aided the railroad in unloading a car. They are held not to be volunteers.

Carriers.

One who accepts an invitation to ride with another passenger knowing that they are traveling on a pass, is held in Rogers *v.* Kennebec Steamboat Co. (Me.) 26 L. R. A. 491, to be bound by the conditions of the pass as to assuming risks of injury even without an express knowledge thereof.

A novel decision as to special freight rates too low to be remunerative, offered to every one when a rival vessel is loading on condition that he will ship nothing by that vessel, is made in Lough *v.* Outerbridge, 143 N.Y. 271, 25 L. R. A. 574, holding that such rates are not unlawful and are not made so by the purpose to suppress competition.

Street Railways.

Greater vigilance and care in running an electric street-car over a public street crossing much frequented by school children than at other places, is held in Wallace *v.* City & S. R. Co. (Or.) 25 L. R. A. 663, to be demanded by the law.

The question of negligence in running a cable car so close to a buggy on the track that the buggy is struck when turning is held in Hicks *v.* Citizens R. Co. (Mo.) 25 L. R. A. 508, to be a question for the jury.

Partnership.

The attachment of a partner's individual property for a partnership debt fraudulently contracted by his copartner is involved in the Michigan case of Jaffray *v.* Jennings, 25 L. R. A. 645, which holds that it cannot be sustained.

Another important case of attachment for a partnership debt is that of Byers *v.* Schlupe, 51 Ohio St. —, 25 L. R. A. 649, holding that partnership property may be attached as that of a nonresident where all the members of the firm reside outside of the state, although the usual place of doing business is in the state and the company is by law suable in its partnership name.

Municipal Corporations.

Negligence of city police to abate and suppress the nuisance of coasting on streets is held in the Delaware case of Wilmington *v.* Vandegrift, 25 L. R. A. 538, to create no municipal liability.

The liability of a municipality for the unsafety of a bathing resort is involved in the case of McGraw *v.* District of Columbia, 25 L. R. A. 691, in which the statute required the establishment of a free bathing beach, but the work had not been completed or the beach thrown open to the public at the time of the accident.

Tenants.

In a late Pennsylvania case, Wilkes Barre Gas Co. *v.* Turner, 7 Kulp, 399, it is decided that the leasing of the ground floor and cellar of a building having gas meters, for supplying the upper floors, located in the cellar, gives the gas company no right of way through the cellar for the purpose of inspect-

ing such meters, where it is not impracticable or unusual to locate them on the upper floors, and no such right is reserved in the lease, and that the mere fact that such meters are there at the time of the lease does not impose on the tenant of the lower floor the burden of them for the benefit of the tenant overhead.

Casting Vote.

A novel decision as to casting votes is made in the Connecticut case of Wooster *v.* Mullins, 25 L. R. A. 694, deciding that where two newspapers are to be selected by a vote of aldermen, each of whom can vote for but one paper, and of twelve votes cast, each of three newspapers had four, the mayor can, on the ground that there is a tie vote, give the casting vote for each of the two to be selected.

Succession Tax.

The New York statute as to collateral inheritance tax is construed in *Re* Roosevelt, 25 L. R. A. 695, deciding that a tax is to be enforced according to the statute existing at the death of the owner of the property, and that where there is a contingency affecting the value of a vested remainder, the tax cannot be assessed so long as it continues. See, also, State *v.* Hamlin, *supra*, under Constitutional Law.

Trust Certificates.

A somewhat unusual decision as to trust certificates is made in the New York case of Cassagne *v.* Marvin, 25 L. R. A. 670, treating them like certificates of corporate stock and holding that their transfer cannot be made conditional on prior payment by the holder of the expenses caused by such holder by an unsuccessful suit against the trustee, except so far as those expenses are taxable as costs in the suit.

Prohibition.

What the court describes as the first instance in the state of Vermont of a petition for a writ of prohibition, is made in the case of Bullard *v.* Thorpe, 25 L. R. A. 605, in which a writ is allowed against an action before a justice of the peace, by which the cause of action was so split up as to defeat an appeal, and the justice had denied any remedy to the defendant.

Ice.

Ice formed on water flowing land which has been taken in condemnation proceedings by a water supply company, is held in the Maine case of Wright *v.* Woodcock, 25 L. R. A. 499, to belong to the water company and not to the owner of the fee.

Waters.

A railroad company bridging a stream is held in the United States Circuit Court in the case of Cairo, V. & C. R. Co. *v.* Brevoort, 25 L. R. A. 527, to be bound to provide a sufficient waterway for the passage of the water, including superabundant water in times of ordinary floods. The decision is also made that a riparian proprietor has no right to erect a levee or artificial bank on the margin of a stream which will cause water in ordinary floods to flow on the lands of the opposite riparian proprietor.

Contracts.

The offer of a reward for the detection of a criminal, although unlimited as to time and never withdrawn, is held in the Maine case of Mitchell *v.* Abbott, 25 L. R. A. 503, to be merely a proposal, and conclusively presumed to be revoked if not accepted by performance within a reasonable time.

The failure of a purchaser of a horse to have a test of speed made on which an additional price was contingent, is held in the Michigan case of Deyo *v.* Hammond, 25 L. R. A. 719, not to prevent the recovery of the additional on other proof of the requisite speed.

Easement.

A way of access by water to land bordering on the sea is held in the Maine case of Kingsley *v.* Gouldsboro Impr. Co., 25 L. R. A. 502, to prevent any right of way of necessity across land of the grantor which encloses it on the land side.

The mere lapse of twenty years is held in Lemmon *v.* Webb (C. A.) [1894] 3 Ch. 1, insufficient to create any easement, which will prevent a land owner from lopping the branches of trees upon the land of an adjoining owner overhanging his own land.

Nuisance.

In the late English case of Lambton *v.* Mellish [1894] 3 Ch. 163, it is decided that two persons, separately using mechanical organs

as accompaniments to amusements on their respective premises in such a manner that the aggregate noise constitutes a nuisance to the neighborhood may be jointly enjoined, although the acts of either would not constitute a nuisance. The court cites as precedents cases as to obstructing a way.

The Humorous Side.

WHEREAS ONCE HE WAS BLIND. As a reason for declaring his marriage null and void, an unsatisfied husband in a New York case set up the fact that the woman's improper relations with himself while she was another man's wife were the cause of a divorce by which she was prohibited from marrying again, but that in spite of this decree she went over into New Jersey with him and married him. The impropriety of this pretended marriage in evasion of the law, and that, too, with a par amour who had broken up her former family relations, was evidently too extreme for him to countenance.

THE COMPLIMENTS OF THE COURT. A Federal judge says: "At the trial, plaintiff introduced witnesses engaged in the business of advertising by posters,—in the picturesque business of placarding fences, walls, and posts, wherever permitted,—who testified that they would cheerfully give five dollars per pole for such advertising purposes. To say nothing of the nuisance of the spectacle of the streets of a city with poles plastered over with flaming vari-colored handbills, as eye catchers, presenting pictures from a prize fight to a circus woman in the folds of a South American reptile, this is hardly a legitimate test of the rental value of such property. The very singularity and attractiveness of such displays gives a fictitious value to such use. The average bill-poster would pay five dollars a month for each tombstone in a graveyard, if he could use them as a fakir for advertising."

COMMON KNOWLEDGE. "He is a d——d fool," said one attorney to another of a third. The other didn't expressly assent to the statement but said, "I move to strike that out as surplusage."

TAKING A MEAN ADVANTAGE. A traveler showing evidence of hard times and leading a steer behind his wagon on his way from Missouri to Indiana, was asked where he was moving. He said: "Stranger, three years ago I left Indiana with $2,000 in money and a good team and outfit, and now I am going back with nothing but this team and this steer. I bought 160 acres of land in Missouri and went to farming. But my crops failed every year and I finally traded eighty acres of my land for this steer and started back for Indiana." "But," asked the other, "what did you do with the other eighty acres of land?" Says the traveler, "I'd rather not say anything about that. I've always dealt square in everything before and I'm a little ashamed of that." "But," said the other, "no one around here will ever see you again and you have aroused my curiosity so you'd better tell me." "Well," says the traveler, "mebbe I might as well make a clean breast of it. You see the feller I traded with was kind of ignorant and couldn't read, so when I deeded him that 80 acres of land I just put in the hull 160 and he never know'd the difference."

Legal Miscellany.

A receiver for a child is something new in procedure, but the *Ohio Legal News* says that at Staunton, Va., the Circuit Court recently appointed a temporary receiver for a child, pending the result of an action in the same court for its permanent custody, while a divorce suit was also pending in California.

That there is any law in the United States touching the ancient subject of benefit of clergy is likely to be news to many. But U. S. Rev. Stat., § 5329, declares "that the benefit of clergy shall not be used or allowed for conviction of any crime for which the punishment is death."

A North Carolina court refusing to review the weight of evidence on appeal after a jury trial says: "In some other states, the appellate court, reaching out after jurisdiction, has so abused this rule that it has caused provision to be placed in the state constitution—notably in the constitution just adopted by the state of New York—forbidding the court of appeals to grant a new trial, even upon the ground that there was no evidence whatever to go to the jury. Henceforward, it is there a conclusive presumption that the trial judge knows his duty, and will not permit a case to be submitted without evidence." So far as concerns the restrictions by the New York constitution on the granting of new trials by the Court of Appeals, it should be noted a very important appellate tribunal is provided between the trial court and the Court of Appeals.

"Pages of Praise"

from interested or disinterested clients, would not be as expressive of the sentiments of the subscribers to the **Lawyers' Reports, Annotated,** as this one short letter from Judge McSherry, of Maryland. Every word hits the mark.

JUDGES:
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Yours truly
Jas. McSherry

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